Supreme Court, U.S.
FILED

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No. 081492

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In The

Supreme Court of the United States

GLORIA WILLETT,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of Appeals Of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When the State seeks to introduce 404(b) evidence of "other crimes or wrongs" in a criminal prosecution allegedly committed by the defendant, are the defendant's Due Process Rights violated when the Court fails to give the defendant a meaningful hearing on the admission of the evidence and:

(1) The lower court fails to make a ruling on the record as to why the evidence to be introduced is reliable and its value outweighs the prejudice created as is required by the rule.

(2) The West Virginia Supreme Court uses an unsworn hearsay statement, not introduced into evidence, as the basis to assume the defendant's sworn testimony is false.

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OPINION BELOW

The West Virginia Supreme Court of Appeals published the opinion State of West Virginia v. Gloria Willett, ___ W.Va. ___, 674 S.E. 2d (2009). The opinion and concurring opinion are reported in Appendix A.

JURISDICTION

The Supreme Court of West Virginia filed its opinion with the clerk January 30, 2009; but ordered the opinion filed March 2, 2009. (See Appendix C). Justice Ketchum filed his concurring opinion on March 19, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

RULES AND PROVISIONS INVOLVED

This petition raises the issues of whether the Due Process Clause and the Confrontation Clause of the United States Constitution apply to allegations "of other crimes" under 404(b) of the State and Federal Rules of Evidence.

Amendment XIV of the Constitution of the U.S.

Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VI of the Constitution of the U.S.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

404(b) West Virginia Rules of Evidence

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of a mistake or accident, provided that upon requested by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

404(b) Federal Rules of Evidence are the same.

STATEMENT OF THE CASE

This case concluded with Justice Menis Ketchum, Justice of the West Virginia Supreme Court, filing a concurring opinion, in which he seeks to modify, if not eliminate, all 404(b) evidence. (See Appendix B).

The facts of this case are as follows:

On May 13, 2005, Beckley, West Virginia Municipal Police Officers executed a search warrant at the home of Gloria Willett and her husband, Richard. During the search, the police recovered approximately 3,000 pills, a hand gun belonging to Richard Willett, and over $1,000 in cash. The pills seized included the drugs: Oxycontin, Percocet, Roxicodone, and Xanax. All of the drugs were obtained by lawful prescriptions by Gloria Willett or her husband, Richard Willett. The petitioner, Gloria Willett, was charged with the state criminal drug offense of four counts of possession with the intent to deliver drugs and one count of the conspiracy to do so.

After reading in the newspaper of the arrest and the execution of the search warrant, an inmate at the local jail and admitted drug addict, Alan Reed, informed authorities that he had on 50 to 100 occasions purchased drugs at the Willett residence from the petitioner; several of these in the presence of her husband, Richard Willett. He acknowledged he did so for more favorable treatment by the State.

Authorities sought to introduce the Alan Reed evidence of collateral crimes or wrongs at trial under

404(b) of the West Virginia Rules of Evidence, which are identical with the Federal 404(b) Rules of Evidence. The defendant filed a Motion for a Bill of Particulars, seeking information as to when the alleged transactions with Alan Reed took place. Although Mr. Reed contended that he made 50 to 100 purchases (Appendix D, Orig. P. 54) at the Willett residence, the State was never able to establish any time, day, week, or even season of the year the alleged transactions took place. The lower court judge made no ruling on the record as to why this evidence of Reed was admissible, or why it was reliable and not prejudicial. At the 404(b) hearing, the State offered only one witness, Alan Reed, who described the alleged transactions, but could not identify any specifics of the time. He named several people who allegedly could corroborate his testimony. He admitted he was incarcerated for "drugs and battery," (Appendix D, Orig. P. 50); the drug he used being heroin (*id.*, Orig. P. 51), he couldn't make bond (*id.*, Orig. P. 57), that he pled guilty to battery and his probation was being revoked. (*Id.*, Orig. P. 52). He was a man of low moral character by every standard. He had numerous problems with the police. Neither the lower court nor the West Virginia Supreme Court has offered a single reason why his testimony was reliable.

For the defendants, Gloria Willett and her husband, Richard Willett, testified that no such drug transactions ever took place. Further, they testified that they spent most of their time residing in the State of Florida and only infrequently journeyed to

West Virginia to check on and to do restoration work on what they planned to be their new home in the State of West Virginia.

The West Virginia Supreme Court relies upon a statement made on cross examination of the defendant, Gloria Willett. When asked about an unsworn statement made by her brother, Gary Lilly, to an investigating officer, who was carrying a wire during the interview, Mrs. Willett acknowledged that she knew that the statement had been made but denied the truthfulness of the statement. The State did not attempt to introduce the actual statement made by Gary Lilly, her brother, nor call him as a witness, either at the hearing or trial.

At the trial, the State used as evidence of the intent to deliver, the large quantities of the drugs. They offered no evidence of controlled buys, or any other parties who allegedly purchased any drugs. The State's sole evidence, outside of the quantity of the drugs, was the testimony of Alan Reed, who was allowed to testify as to the alleged 50 to 100 transactions that had been the subject of the 404(b) hearing.[1]

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[1] At the trial, Gloria Willett contended that she was a "drug hoarder." Drug hoarders are those who store drugs, are often on limited incomes and keep the drugs in order that they might have a ready stockpile in the event that they need them. The number of pills that were found was totally contrary to the testimony of Alan Reed, who testified at the hearing that the Willetts could only stay until their pills were gone. The pills

(Continued on following page)

Gloria Willett was convicted on four counts of possession with intent to deliver and one count of conspiracy and sentenced to the penitentiary.

Following her conviction, Gloria Willett appealed her conviction to the West Virginia Supreme Court. Her petition included several grounds but was accepted on the sole issue as to whether the 404(b) evidence was lawfully admitted into evidence. Her contention was that the 404(b) testimony of Alan Reed was "not reliable" and therefore, the State had not established by a preponderance of the evidence that the evidence met the evidentiary requirements of being "reliable" as required by the rules. The lower court had not made an actual ruling or finding on the record as to why the evidence was reliable and was not outweighed by the prejudice that it would engender.

In her Petition for Appeal to the West Virginia Supreme Court, the petitioner stated that the 404(b) evidence of other crimes must meet the Constitutional requirements of Confrontation (i.e the State could not rely upon Gary Lilly's statement). In oral arguments to the West Virginia Supreme Court, counsel for Gloria Willett again cautioned the West Virginia Supreme Court that using evidence of 404(b)

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found showed that the pills had been prescribed and dispensed through a lawful pharmacy over a considerable period of time. A number of bottles that were recovered were not even missing any of the pills prescribed. The Court barred the testimony of the daughter, who was trained by the Tampa City Police on "drug hoarding."

evidence, whose foundation was a hearsay statement, would be a violation of rights of Confrontation and Due Process as guaranteed by the United States Constitution.

In the written opinion the West Virginia Supreme Court justified the reliability of the 404(b) evidence as follows:

> "The prosecutor had intended to have Mr. Lilly to testify at the hearing, but he was not available. Ms. Willett acknowledged at the hearing that Mr. Lilly was in Florida or importantly, Mr. Willett's testimony revealed that Mr. Lilly gave a statement to the police that corroborated Mr. Reed's testimony. Mrs. Willett stated that she had read the statement by Mr. Lilly and Mrs. Willett asserted that the statement was not true."

(See Appendix A).

At no time did Mr. Lilly testify, nor was his statement ever introduced into evidence either at the 404(b) hearing or at the trial. The only evidence taken under oath, is that, according to Mrs. Willett the statement is false.[2]

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[2] According to Mrs. Willett, Gary Lilly made up the accusation because he thought she was going to inform the police that he had previously broken into her home. However, at no time did Mrs. Willett inform the police about the alleged break in. After questioning about the matter, Mrs. Willett testified as follows:

(Continued on following page)

The Court also uses the following to conclude the Willett's testimony was false:

> "There was further testimony by Mr. Reed. He testified that, on at least two occasions, he cut Mrs. Willett's lawn, and she paid him with drugs. Mrs. Willett acknowledged that Mr. Reed had cut her lawn. She stated, however, that she had paid him cash for his services. Mr. Reed also testified that, while he was incarcerated, he called the police to inform them that Mrs. Willett was a drug dealer in order to make a deal to get out of jail. The record reflects that the prosecutor refused to offer any deal to Mr. Reed."

At the hearing, Mrs. Willett and her husband, who had no other prior criminal record and who had at least two family members who were involved in police work, said that the transaction did not take place.

In conclusion, the lower court did not make a record of its findings, but the West Virginia Supreme Court fills in the record and uses an unsworn hearsay statement not of record of Gary Lilly and by its

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Q. "I guess I'm wondering if nothing happened to your brother at that – as a result of the break-in and that was in November of 2004, why did he give a police statement in May of 2005?"

A. "Because I had quit talking to him because of this incident of him because of incident of him breaking into my house, and I had told him I was going to call the police."

opinion rules that this is sufficient evidence to have 404(b) evidence of other crimes to be used against a criminal defendant.

In the concurring opinion Justice Menis Ketchum, Justice of the West Virginia Supreme Court makes an argument to modify, if not abolish, all 404(b) evidence of other collateral crimes and wrongs on the basis that it will lead to the conviction of innocent parties. (See Appendix B).

REASONS FOR GRANTING THE PETITION

1. **Justice Menis Ketchum, Justice of the Supreme Court of the State of West Virginia, in his concurring opinion uses this case to argue that all use of 404(b) evidence should be either greatly restricted, modified or eliminated. (See Appendix B).**

2. **The Supreme Court of the United States can clarify whether a defendant is entitled as part of due process to a meaningful 404(b) hearing, where the State is attempting to prove the defendant is guilty of another crime, which includes the right of confronting witnesses against him or her in a prosecution attempting to prove by 404(b) evidence that the defendant was guilty of "other wrongs or collateral crimes."**

The Honorable Justice Menis Ketchum of the West Virginia Supreme Court, in his concurring opinion, without discussing the details of this case,

(see Appendix B), makes an appeal that all 404(b) evidence should be eliminated for the grave danger that it presents to innocent parties. He fears innocent people will be convicted in the future because they are labeled as bad people or that they have the propensity to commit a particular crime. His argument is that the 404(b) evidence is greatly abused and that juries tend to use this type of evidence in a fashion that takes away their direct attention of the evidence of the crime for which the party is charged.

Justice Ketchum, however, does not deal with the problems of this particular case; a missing order, a finding of fact, or the right to confront witnesses accusing her of other crimes, relies upon a statement that is not introduced into evidence by a third party, Gary Lilly.[3] The sworn testimony at the 404(b) hearing by Gloria Willett was that statement was not true. The West Virginia Supreme Court acknowledges that Gary Lilly never testified and yet a statement not even introduced into evidence is apparently sufficient evidence to say that a convicted heroin addict's testimony is reliable and thus admissible, all of which was rebutted by two reliable parties.

The 4th Circuit Criminal Handbook, (2008) Section 241, P. 257 quotes as follows:

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[3] The statement of Mr. Lilly was recorded by a police officer, who was wearing a wire at the time and concealed the fact that the statement was being taken.

> "Fed. R. Evidence 404(b) permits evidence of a defendant's prior crimes, wrongs or other bad acts to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," but only if (1) relevant to an issue other than character; (2) necessary; and (3) reliable. See generally *United States v. Uzenski,* 434 F. 3d 690, 710-11 (4th Cir. 2006); *United States v. Bailey,* 990 F. 2d 119, 122 (4th Cir. 1993); *United States v. Mark,* 943 F. 2d 444, 447 (4th Cir. 1991); *United States v. Watford,* 894 F. 2d 665, 671-72 (4th Cir. 1990); *United States v. Hadaway,* 581 F. 2d 214, 217-18 (4th Cir. 1990; and *United States v. Masters,* 622 F. 2d 83, 87 (4th Cir. 1980)."

In *United States v. Queen,* 132 F. 3d 991, 995 (4th Cir. 1997), cert. denied, 523 U.S. 1101 (1998), the Fourth Circuit acknowledged that certain of its 404(b) decisions "appear to lack consistency." After addressing, some of the dangers that Rule 404(b) was intended to avoid; the Federal Court restated a combined test for admissibility under Rules 404(b) and 403.

> "[We hold that evidence of prior acts becomes admissible under Rules 404(b) and Rule 403 if it meets the following criteria; (1) The evidence, must be relevant to an issue, such as an element of the offense, and must not be offered to establish the general character of the defendant. In this regard, the more similar the prior act is (in terms of physical similarity or mental state) to the act proved, the more relevant it becomes. (2) The act

> must be necessary in the sense that it is probative of any essential claim or an element of the offense. (3) The evidence must be reliable. And, (4) the evidence's probative value must not be substantially outweighed by confusion or unfair prejudice in the sense that it tends to subordinate reason to emotion in the fact finding process."

The petitioner's argument goes to No. (3), Alan Reed's testimony was not reliable and generated an unfair prejudice in that it tends to subordinate reason to emotion in the fact finding process. Allegations of drug sales create a negative emotional response. The jury is prone to believe that the allegations in the indictment confirm the 404(b) evidence. 404(b) evidence should stand on its own and prove the indictment, not the reverse.

In the case of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 1977 (2004), the United States Supreme Court decided that in trials the only reliable way of determining reliability is by direct examination and confrontation with the witness who is speaking.

The United States Constitution Amendment VI deals with all criminal prosecutions.

Petitioner contends that same test of reliability by confrontation should apply to where the defendant is accused of other crimes in a 404(b) hearing.

CONCLUSION

The Court should overturn the conviction of Gloria Willett and remand the proceeding to require the lower court to make a finding of fact upon the 404(b) evidence based upon evidence that is not in violation of the Confrontation Clause of the United States Constitution.

Respectively submitted by,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2009 Term

No. 33835

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee,

V.

GLORIA JEAN WILLETT,
Defendant Below, Appellant.

Appeal from the Circuit
Court of Raleigh County
Honorable John A. Hutchinson, Judge
Civil Action No. 06-F-70
AFFIRMED

Submitted: January 13, 2009
Filed: January 30, 2009

Paul S. Detch	**Tom Truman**
Lewisburg,	**Assistant Prosecuting**
West Virginia	**Attorney**
Attorney for the	**Beckley, West Virginia**
Appellant	**Attorney for Appellee**

The Opinion or the Court was delivered PER CURIAM.

JUSTICE KETCHUM concurs and reserves the right to file a concurring opinion.

JUSTICE ALBRIGHT not participating.

SENIOR STATUS JUSTICE McHUGH sitting by temporary assignment.

SYLLABUS BY THE COURT

"Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin,* 176 W. Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A

limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence." Syllabus point 2, *State v. McGinnis,* 193 W. Va. 147, 455 S.E.2d 516 (1994).

Per Curiam:[1]

Gloria Jean Willett, defendant below and appellant herein (hereinafter referred to as "Mrs. Willett"), appeals from an order of the Circuit Court of Raleigh County denying her motion for a new trial. Mrs. Willett was sentenced to prison after being convicted by a jury on four counts of drug possession with intent to deliver. She was also convicted of one count of conspiracy to commit a felony.[2] In this Court, Mrs. Willett assigns error to the trial court's ruling that permitted the jury to hear evidence of collateral crimes under Rule 404(b) of the West Virginia Rules

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[1] Pursuant to an administrative order entered on January 1, 2009, the Honorable Thomas E. McHugh, Senior Status Justice, was assigned to sit as a member of the Supreme Court of Appeals of West Virginia commencing September 12, 2008, and continuing until the Chief Justice determines that assistance is no longer necessary, in light of the illness of Justice Joseph P. Albright.

[2] The circuit court sentenced Mrs. Willett to one to fifteen years imprisonment on one count of drug possession with intent to deliver. Sentences were imposed for the remaining counts but were suspended. Mrs. Willett is now out of prison and on parole.

of Evidence.[3] After a careful review of the briefs and the record submitted on appeal, and having listened to the oral arguments of the parties, we affirm.

I.

FACTUAL AND PROCEDURAL HISTORY

In 2001 or 2002, Mrs. Willett and her husband, Richard Willett, purchased a modest house in Beckley, West Virginia.[4] At the time of the purchase, the couple resided in Tampa, Florida. The house purchased in Beckley was in poor condition and required a lot of structural work. Consequently, for several years after the house was purchased, the Willetts continued to reside in Tampa. However, the couple frequently drove to Beckley to have work done on the house.

At some point in 2004, the Beckley City Police Department received a telephone call from an inmate at the Southern Regional Jail. The inmate, Alan Reed, informed the police that drugs were being sold from the house purchased by the Willetts. Subsequent to this call, in August of 2004, a Beckley police detective received additional information from another source that indicated a white female was coming

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[3] Mrs. Willett's petition for appeal also assigned a second ground for appeal. However, this Court limited the appeal to the collateral crimes issue.

[4] Mrs. Willett had family members living in the Beckley area.

from the Tampa, Florida, area to a house at 201 Quarry Street, the Willetts' home, and she would bring large amounts of Oxycontin to the home, possibly to sell. On a third occasion in 2004, the Beckley police received an anonymous call regarding drug activity at the Willetts' home:

> The caller went into detail that they had personally observed cars coming to the house, but parking away from the house as not to draw attention to themselves, going to the house for four or five minutes and then leaving, and they – in their opinion, they thought that some drug activity was going on.

In May 2005, the Beckley police received a fourth anonymous tip about drug activity at the Willetts' home. The anonymous informer named Mrs. Willett as the person selling drugs from the home.

On May 13, 2005, the Beckley police executed a search warrant for the Willetts' home. During the search, the police discovered over 3,000 pills, a handgun, and over $1,000 in cash. The pills included the narcotic drugs Oxycontin, Percocet, Roxycodone, and Xanax. Subsequent to the search, the police arrested Mrs. Willett.[5]

Mrs. Willett was indicted by a grand jury on four counts of drug possession with intent to deliver, and one count of conspiracy to commit a felony. In 2006,

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[5] The police also arrested Mr. Willett. However, charges against him were eventually dropped.

the case went to trial. During the trial, the prosecutor called five witnesses. Four of the witnesses were law enforcement officials who testified regarding evidence obtained during the search. They also provided testimony about information obtained during the investigation of the case. The fifth witness, Alan Reed, was the only witness to provide direct testimony of having purchased drugs from Mrs. Willett.[6] Mr. Reed testified that he was a drug addict and that during the period 2003 to 2005, he visited Mrs. Willett's home "about 50 to 100 times" to obtain narcotic pills from Mrs. Willett. Mr. Reed also testified that he brought other individuals to Mrs. Willett for the purpose of buying narcotic drugs. On those occasions, Mrs. Willett would give him drugs as a gratuity for bringing customers to her. There was further testimony by Mr. Reed that, on a few occasions, Mr. Willett was present when he obtained drugs from Mrs. Willett.

During Mrs. Willett's case-in-chief, she called her husband and adult daughter to testify on her behalf. Mr. Willett testified that his wife did not sell drugs. Their daughter testified that Mrs. Willett had a habit of hoarding all types of drugs for her personal use. Mrs. Willett took the stand. She testified that the narcotic drugs were legally obtained from prescriptions written by a Florida physician and a West

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[6] Prior to trial, Mrs. Willett filed a motion to preclude testimony by Mr. Reed. The trial court, after a hearing, denied the motion and allowed the testimony under W. Va. Rules of Evidence 404(b).

Virginia physician.[7] Mrs. Willett admitted that neither doctor knew the other was prescribing the same narcotic drugs for her. She further testified that she needed the drugs to relieve pain from a back operation that she had in 2000. Mrs. Willett further stated that because she feared having problems obtaining the drugs, she began hoarding them.

At the conclusion of all the evidence, the jury returned a verdict convicting Mrs. Willett on each count of the indictment. The trial court subsequently imposed a sentence of imprisonment on one count that was to be served, but suspended the sentences imposed on the remaining counts. After the trial court denied Mrs. Willett's post-trial motion for a new trial, she filed this appeal.

II.

STANDARD OF REVIEW

This case requires the Court to determine whether the circuit court properly admitted Mr. Reed's testimony pursuant to Rule 404(b) of the W. Va. Rules of Evidence. In discussing the standard of review to be applied to Rule 404(b) issues, this Court has stated:

> The standard of review for a trial court's admission of evidence pursuant to Rule

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[7] The drug Roxycodone was actually prescribed for Mr. Willett.

> 404(b) involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.

State v. LaRock, 196 W. Va. 294, 310-11, 470 S.E.2d 613, 629-30 (1996). In *State v. McGinnis,* 193 W. Va. 147, 455 S.E.2d 516 (1994), we explained that this Court will "review the trial court's decision to admit evidence pursuant to Rule 404(b) under an abuse of discretion standard." *McGinnis,* 193 W. Va. at 159, 455 S.E.2d at 528. *McGinnis* further held:

> Our function on . . . appeal is limited to the inquiry as to whether the trial court acted in a way that was so arbitrary and irrational that it can be said to have abused its discretion. In reviewing the admission of Rule 404(b) evidence, we review it in the light most favorable to the party offering the evidence, in this case the prosecution, maximizing its probative value and minimizing its prejudicial effect.

McGinnis, 193 W. Va. at 159, 455 S.E.2d at 528. Guided by these standards, we now consider the substantive issues herein raised.

III.

DISCUSSION

The sole issue presented for resolution is whether the circuit court properly admitted testimony presented by Mr. Reed under Rule 404(b).[8] As previously discussed, Mr. Reed's testimony involved prior criminal drug sales by Mrs. Willett. Insofar as Mrs. Willett was charged with possession of drugs with intent to deliver, Mr. Reed's testimony involved "other crimes" by Mrs. Willett. Rule 404(b) states, in part,

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[8] "Rule 404(b) only applies to limit the admissibility of evidence of extrinsic acts. Intrinsic evidence, on the other hand, is generally admissible so that the jury may evaluate all the circumstances under which the defendant acted." *United States v. Sumlin*, 489 F.3d 683, 689 (5th Cir. 2007) (internal quotations and citation omitted). *See State v. LaRock*, 196 W. Va. 294, 312 n.29, 470 S.E.2d 613, 631 n.29 (1996) ("In determining whether the admissibility of evidence of other bad acts is governed by Rule 404(b), we first must determine if the evidence is intrinsic or extrinsic. Other act evidence is intrinsic when the evidence of the other act and the evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged. If the proffer fits in to the intrinsic category, evidence of other crimes should not be suppressed when those facts come in as *res gestae* – as part and parcel of the proof charged in the indictment.") (internal quotations and citation omitted). Insofar as the parties and trial court treated Mr. Reed's testimony as being governed by Rule 404(b), we limit our analysis of the admissibility of Mr. Reed's testimony to that rule. Further, it has been correctly noted that "the use of the evidence by the jury under a 404(b) theory or an 'inextricably intertwined' theory is not materially different." *United States v. McLean*, 138 F.3d 1398, 1404 (11th Cir. 1998).

that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith." However, Rule 404(b) provides an exception to its general prohibition against the introduction of "other crimes" evidence. Under this exception, "other crimes" evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial . . . of the general nature of any such evidence it intends to introduce at trial[.]" Rule 404(b).

In syllabus point 2 of *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994), this Court established the procedure for trial courts to follow in ruling upon the admissibility of Rule 404(b) evidence:

> Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a

> preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

The prosecution filed notice of its intention to introduce Rule 404(b) evidence through Mr. Reed at the trial.[9] In its notice, the prosecution declared the purpose for which the evidence was to be offered was that of motive, planning, and intent. Mrs. Willett filed a motion to exclude the testimony of Mr. Reed. The trial court then conducted an evidentiary hearing with respect to the prosecutor's notice and Mrs. Willett's motion. During the hearing, the trial court heard testimony from Mr. Reed, Mrs. Willett, and Mr.

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[9] The notice also named another witness, Gary Lilly, but that witness was not called at trial.

Willett. Ultimately, the trial court found that the prosecutor satisfied the requirements for admitting Mr. Reed's testimony under Rule 404(b).[10]

Mrs. Willett's brief appears to challenge the trial court's Rule 404(b) ruling on the basis that the evidence was insufficient to establish that Mr. Reed's testimony was reliable. She also asserts that the probative value of the evidence was outweighed by its prejudicial effect.[11] We address those two matters separately.

As to the reliability issue, Mrs. Willett argues that Mr. Reed was unable to provide any specific date

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[10] After the hearing, the trial court took the issue under advisement. No formal ruling was made on the issue. The trial court's office informally notified the prosecutor that Mr. Reed would be allowed to testify. We caution trial judges that, when making Rule 404(b) determinations, the record should expressly reflect the reasoning employed by the court in reaching its ruling. In the instant case, the trial court's failure to state its reasoning on the record does not require reversal. *See State ex rel. Caton v. Sanders,* 215 W. Va. 755, 762 n.6, 601 S.E.2d 75, 82 n.6 (2004) ("We note that a failure to expressly articulate how 404(b) evidence is probative does not mandate *automatic* reversal. If the basis for the admission of the evidence is otherwise clear from the record, we can affirm the circuit court.").

[11] Mrs. Willett's brief is, at best, inartfully drafted. The brief is divided into terse sections that appear to raise issues. However, it falls short of presenting legally sufficient arguments. *See State v. LaRock,* 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996) ("Although we liberally construe briefs in determining issues presented for review, issues which are . . . mentioned only in passing but are not supported with pertinent authority . . . are not considered[.]" (citation omitted)).

on which the drug transactions occurred, and there was no evidence to corroborate his testimony. We reject these arguments as a basis for reversal. The record is clear. The prosecutor established by a preponderance of the evidence that the acts occurred and that Mrs. Willett took part in them.

At the suppression hearing, Mr. Reed testified that he was involved in 50 to 100 drug transactions with Mrs. Willett over a two-year period. Mr. Reed testified that he was introduced to Mrs. Willett by her brother, Gary Lilly. Mr. Reed stated that he went to see Mr. Lilly to buy drugs. Mr. Lilly had no drugs. However, Mr. Lilly informed Mr. Reed that he could buy drugs from his sister, Mrs. Willett. The following testimony was given by Mr. Reed during direct and cross examination at the hearing:

> Q. How did you find out Mrs. Willett had pills to sell?
>
> A. Her brother introduced me to her.
>
> Q. What's her brother's name?
>
> A. Gary Lilly.
>
> . . . .
>
> Q. And I take it that Gary would be a person who would be available to confirm or deny that particular statement?
>
> A. Yeah.
>
> Q. Now – and where did that particular transaction take place?

A. I went down to Gary's and Gary said he didn't have any, so we went to his sister's house.

Q. And both of you went?

A. Yes.

Q. And that would have been, to your best recollection, two years ago?

A. Yes.

The prosecutor had intended to have Mr. Lilly testify at the hearing, but he was not available. Mrs. Willett acknowledged at the hearing that Mr. Lilly was in Florida. More importantly, Mrs. Willett's testimony revealed that Mr. Lilly gave a statement to the police that corroborated Mr. Reed's testimony. Mrs. Willett stated that she had read the statement by Mr. Lilly. Mrs. Willett asserted that the statement was not true. According to Mrs. Willett, Mr. Lilly made up the accusations because he thought that she was going to inform the police that he had previously broken into her home. However, at no time did Mrs. Willett inform the police about the alleged break-in. After extensive questioning about the matter, Mrs. Willett testified as follows:

Q. I guess I'm wondering if nothing happened to your brother at that – as a result of the break-in and that was in November of '04, why did he give a police statement in May of '05?

> A. Because I had quit talking to him because of this incident of him breaking into my house, and I had told him I was going to call the police.

There was further testimony by Mr. Reed. He testified that, on at least two occasions, he cut Mrs. Willett's lawn, and she paid him with drugs. Mrs. Willett acknowledged that Mr. Reed had cut her lawn. She stated, however, that she had paid him cash for his services. Mr. Reed also testified that, while he was incarcerated, he called the police to inform them that Mrs. Willett was a drug dealer in order to make a deal to get out of jail. The record reflects that the prosecutor refused to offer any deal to Mr. Reed.

When looking at the evidence in its totality, we are satisfied that the trial court properly admitted Mr. Reed's testimony under Rule 404(b). Even though Mr. Reed was unable to give any specific dates regarding his drug transactions with Mrs. Willett, that matter is tempered by the fact that there was testimony by Mrs. Willett that her brother gave the police a statement that corroborated Mr. Reed's accusations against her.[12] Consequently, we find no clear error in

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[12] We should note that Professor Cleckley has correctly observed that Rule 404(b) evidence may be admitted without corroboration:

> [F]or Rule 404(b) evidence to be admissible it must be reliable. Reliability is not synonymous with "credibility" and testimony is therefore not unreliable simply because it is in conflict or contradicted by

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the trial court's determination that there was sufficient evidence to show that the other bad acts actually transpired. We further find that the trial court properly deemed the evidence admissible for a legitimate purpose under the Rule 404(b) analysis. It was used to demonstrate Mrs. Willett's motive, planning, and intent.

Likewise, we find the circuit court properly concluded that the prejudicial effect of Mr. Reed's testimony did not outweigh the probative value of that evidence. This Court has previously stated that "[m]ost, if not all, [evidence] which one party to an action offers in evidence [is] calculated to be prejudicial to the opposing party; therefore, it is only 'unfair prejudice' with which . . . [Rule 404(b) is] concerned." *State v. McIntosh,* 207 W. Va. 561, 573, 534 S.E.2d 757, 769 (2000) (internal quotations and citations omitted). We have also made clear that "[u]nfair prejudice does not mean damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis." *LaRock,* 196 W. Va. at 312, 470 S.E.2d at 631. Applying this

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other testimony. Thus, this evidence can be admitted even though it is not corroborated.

1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers,* § 4-5(B)(3)(c) (4th ed. 2000). *See State v. Zacks,* 204 W. Va. 504, 509, 513 S.E.2d 911, 916 (1998) (" 'Courts have held that corroboration of 404(b) evidence of other crimes is not required.' ") (quoting *United States v. Bailey,* 990 F.2d 119, 123 (4th Cir. 1993)).

standard, the trial court reasonably could have concluded that Mr. Reed's testimony was probative of a fact and was not unduly prejudicial.

Mr. Reed's testimony about the uncharged drug transactions was integrally connected to the criminal activity charged in the indictment. Evidence of the prior drug sales was necessary to place Mrs. Willett's possession of such a large amount of narcotic prescription pills in context and to complete the story of the charged crimes. Mr. Reed's "testimony was so highly probative that any possible prejudice evaporated in comparison to it. Discerning no error, we hold the trial court acted within the realm of discretion in permitting the jury to hear and consider the contested testimony." *LaRock,* 196 W. Va. at 313, 470 S.E.2d at 632.

IV.

CONCLUSION

The circuit court's order denying Mrs. Willett's motion for a new trial is affirmed.

Affirmed.

No. 33835 – *State of West Virginia*
v. Gloria Jean Willett

(Filed Mar. 19, 2009)

Ketchum, J., concurring:

I concur with the majority's opinion. Reading the record in the light most favorable to the prosecution, the trial judge did not abuse his discretion in allowing the jury to hear evidence of the defendant's uncharged "bad acts" admitted under Rule 404(b) of the *West Virginia Rules of Evidence.*

I feel compelled to write separately because I believe that the use of "bad acts" evidence under Rule 404(b) in criminal trials is now routinely used to convince the jury that they should convict the defendant because he or she is not a nice person.

A.
Modification of Rule 404(b) is
Needed to Protect the Innocent

We all know the axiom that "[i]n the trial of a criminal offense, the presumption of innocence existing in favor of a defendant continues through every stage of the trial until a finding of guilty by the jury." Syllabus Point 11, *State v. Pietranton,* 140 W.Va. 444, 84 S.E.2d 774 (1954). But the real world truth is that, when a jury hears evidence that a defendant has committed some bad acts beyond those in the indictment, the jury dispenses with any notions that the defendant is innocent and reviews the evidence from

the perspective that the defendant is a "bad person." It is undeniable that a jury will be more inclined to convict once they hear that a defendant may have engaged in other "bad acts" – even if the defendant was never charged or convicted for that other conduct. "The niceties of a *McGinnis* analysis do little to remove the overwhelming prejudicial effect that is heaped upon a defendant in a criminal case, once a jury learns of the defendant's previous bad acts." *State v. Scott,* 206 W.Va. 158, 168, 522 S.E.2d 626, 636 (1999) (Starcher, C.J., dissenting) (citing *State v. McGinnis,* 193 W.Va. 147, 455 S.E.2d 516 (1994)).

Rule 404(b) was originally designed to keep such fundamentally unfair evidence of uncharged misconduct away from the jury, allowing the jury to focus on the proper question: does the evidence show the defendant committed the crime with which he or she is currently charged? However, since I took the bench two months ago, "bad acts" evidence has been raised as an error in virtually every criminal appeal presented to our Court. It is obvious that prosecutors are using "bad acts" evidence to prejudice defendants and to divert jurors' attention from the evidence surrounding the charged crime. This abusive use of uncharged "bad acts" evidence by prosecutors will, in the future, lead to the conviction of an innocent person. Of this, I am convinced. I therefore propose a change to Rule 404(b) in criminal cases.

B.

The Correct Rule: State v. Miller (1915)

As early as 1872, this Court said that evidence of misconduct other than that for which a defendant was being tried could not be used at a trial. We held in Syllabus Point 1 of *Watts v. State,* 5 W.Va. 532 (1872):

> Evidence of a distinct, substantive offense cannot be admitted in support of another offense.

This absolute prohibition later softened slightly, and the Court permitted such evidence to be used in rebuttal – but only if the defendant first attempted to show he did not commit the crime because he was a person of good character. As we said in Syllabus Point 2 of *State v. Miller,* 75 W.Va. 591, 84 S.E. 383 (1915):

> It is error to admit evidence, in such a case, tending to prove bad character or degradation on the part of the accused, over his objection and in the absence of evidence adduced by him to establish good character on his part.

See also, Syllabus Point 1, *State v. Graham,* 119 W.Va. 85, 191 S.E. 884 (1937) ("In a criminal trial, the state cannot introduce evidence, not connected with the crime for which the accused is being tried, for the purpose of showing his bad character, until the accused has first put his own character in issue by attempting to prove a previous good character.")

C.

The Shift Away from the Correct Rule

When I first started practicing law in 1967, prosecutors rarely if ever tried to convict a defendant using evidence of "uncharged misconduct" and "other bad acts." Courts were exceptionally restrictive, and rarely allowed the use of collateral crimes to be admitted. The defendant was tried for the crime charged in the warrant or the indictment. The common-law rule of evidence on "other bad acts" in West Virginia was a clear rule of exclusion: the evidence could not be admitted, except for a few narrow exceptions.

It was axiomatic that when a person was placed on trial for the commission of a particular crime, if the person was going to be convicted, then the person was going to be convicted based upon evidence showing the person's guilt of the specific offense charged in the indictment. Nothing more, nothing less.

The reason that West Virginia – and, for that matter, most other jurisdictions – opted to generally exclude evidence of other collateral bad acts was stated this way in 1961:

> Evidence of the accused's past criminal history – prior convictions at trial, pleas of guilty, acquittals for technical reasons, arrests, and police or private suspicions – have traditionally been viewed with distrust in Anglo-American law. Probably the principal reason for limiting the use of "other crimes" evidence at trial has been the fear that such

> evidence will prejudice the jury against the accused. The notion of prejudice encompasses two distinct tendencies of jurors. The first is the tendency to convict a man of the crime charged, not because he is guilty of that offense, but because evidence introduced indicates that he had committed another unpunished crime or that he is a "bad man" who should be incarcerated regardless of his present guilt. A conviction for this reason would violate the principle that a man may be punished only for those acts with which he has been charged. The second is the tendency to infer that because the accused committed one crime, he committed the crime charged. In many instances this inference rests on no greater foundation than the belief that commission of one crime indicates a propensity to commit others. Convictions based on this equation are disapproved because of the limited probity of propensity evidence. Whatever statistical data may demonstrate about the likelihood of repeated crimes in a given group of offenders, it says little about the guilt of an individual defendant. Recognizing both these jury tendencies, American courts have generally excluded other crimes evidence which proves no more than "criminal disposition" or "criminal character," reasoning that the possibility of inflaming jury sentiments outweighs the limited relevance of such evidence.

Note, 70 Yale L.J. 763-64 (April, 1961). *See also, McKinney v. Rees,* 993 F.2d 1378, 1380 (9th Cir. 1993)

(*quoting Harrison's Trial,* 12 How.St.Tr. 834 (Old Bailey 1692)) ("Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter.").

My recollection of the rare use of bad acts evidence in criminal cases is supported by Syllabus Point 11 of *State v. Thomas,* 157 W.Va. 640, 203 S.E.2d 445 (1974), where the Court said:

> Subject to exceptions, it is a well-established common-law rule that in a criminal prosecution, proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged, is incompetent and inadmissible for the purpose of showing the commission of the particular crime charged, unless such other offenses are an element of or are legally connected with the offense for which the accused is on trial.

The Court in *Thomas* went on, in Syllabus Point 12, to list the five exceptional cases where "other bad acts" evidence could be admitted:

> The exceptions permitting evidence of collateral crimes and charges to be admissible against an accused are recognized as follows: the evidence is admissible if it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the

> others; and (5) the identity of the person charged with the commission of the crime on trial.

The *Thomas* Court expressed the obvious concern that prosecutors might still try a defendant for one crime by using evidence that the defendant committed other crimes, and raise the inference with the jury that because the defendant had previously committed other crimes, then the defendant was more liable to have committed the crime for which he or she is presently indicted and being tried.[1]

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[1] One commentator, in a treatise on uncharged misconduct, gave the following summary of research on the effect of bad acts evidence in criminal cases:

> . . . Studies by the London School of Economics (LSE) indicate that the admission of a defendant's uncharged misconduct significantly increases the likelihood of a jury finding of liability or guilt. The Chicago Jury Project reached the same conclusion. The Chicago researchers concluded that as a practical matter, the presumption of innocence operates only for defendants without prior criminal records. Evidence of uncharged misconduct strips the defendant of the presumption of innocence. If the judge admits a defendant's uncharged misconduct and the jury thereby learns of the record, the jury will probably use a "different . . . calculus of probabilities" in deciding whether to convict. The uncharged misconduct stigmatizes the defendant and predisposes the jury to find him liable or guilty.
>
> The National Science Foundation Law and Social Science Program sponsored research into the prejudicial impact of various types of evidence. That research confirms the conclusions reached earlier by the LSE

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But an even greater concern expressed by the *Thomas* Court was not with "the arguable admissibility of the evidence of collateral crimes and charges under one of the recognized exceptions, but rather, whether the prosecutor prejudiced the accused by the excessive employment or 'shotgunning' of such evidence against the accused." *Thomas,* 157 W.Va. 640, 656, 203 S.E.2d 445, 456. The Court was concerned that prosecutors would poison a jury's attitude toward a defendant through nothing more than piling on massive and wide-ranging volumes of "other bad acts" evidence. The mere quantity of this evidence would also prejudice a defendant by confusing the defendant's ability to present a defense to the indictment by compelling the defendant to defend against unrelated, uncharged offenses.[2]

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and University of Chicago studies. The researchers discovered that laypersons often differ from attorneys in their estimation of the prejudicial effect of evidence and that within each group, laypersons and attorneys frequently disagree among themselves. However, "the greatest agreement . . . is found in connection with evidence suggesting immoral conduct by the defendant. . . ." In another research project supported by the National Science Foundation, Edith Greene and Elizabeth Loftus found that "jurors' ratings of a defendant's guilt are higher when crimes are joined than when the offenses are tried separately."

Edward Imwinkelried, 1 *Uncharged Misconduct Evidence* § 1:2 [2008] (footnotes omitted).

[2] As the Court said in *Thomas*:

Certainly, the indiscriminate receipt of such evidence in volume and scope can predispose the minds of the

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The Court therefore gave the following admonition to circuit courts in criminal cases:

> In the exercise of discretion to admit or exclude evidence of collateral crimes and charges, the overriding considerations for the trial court are to scrupulously protect the accused in his right to a fair trial while adequately preserving the right of the State to prove evidence which is relevant and legally connected with the charge for which the accused is being tried.

Syllabus Point 16, *Thomas, supra.*[3]

> jurors to believe the accused guilty of the specific crime by showing him guilty or charged with other crimes. Moreover, the admissibility of the collateral crimes raises collateral issues which compel the defendant to meet charges of which the indictment gives him no information; which confuse his strategy of defense; and which raise such a variety of issues that the jury's attention is diverted from the charge immediately before it. This result, obviously prejudicial, is to be avoided by prompt objection on the part of the defense and close attention and control by the trial court to insure that an accused receives a fair trial when he is being subjected to zealous prosecution.

Thomas, 157 W.Va. at 656, 203 S.E.2d at 456.

[3] *See also*, Syllabus Point 8, *State v. Ramey*, 158 W.Va. 541, 212 S.E.2d 737 (1975) ("It is the policy of the law that matters which are collateral to material issues of a criminal trial shall not obfuscate the main issues of the case or be introduced for the purpose of prejudicing the defendant by making him respond to a separate criminal charge; accordingly, absent a proper foundation for the introduction of an otherwise collateral matter, the

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D.
The Academics Take Over

In 1975, Congress adopted the *Federal Rules of Evidence*. "The philosophy of the Federal Rules, and it qualifies as revolutionary, is that any relevant evidence, by which it is meant anything that gives promise of being helpful to the trier of facts, is admissible if it is not rendered incompetent, for policy-based reasons, by a dwindling number of exclusionary rules[.]" Jon R. Waltz, "Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence," 79 N.W.U.L.Rev. 1097, 1120 (1984).

Rule 404(b) of the *Federal Rules of Evidence* codified the "uncharged misconduct" doctrine in two sentences, but it shifted the doctrine from being exclusionary to being inclusionary. That is to say, under Rule 404(b), it became easier to admit evidence of other bad acts.[4] The 1975 Rule 404(b) stated:

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court, in the exercise of sound discretion, should refuse such proffer.").

[4] "Despite the common law's exclusionary approach, the drafters of the Federal Rules also endorsed the inclusionary notion that the more evidence presented at trial, the more likely the fact finder will learn the 'truth.' This latter policy encourages the admission of even marginally relevant evidence." Stephanie Yost, "Reversals of Fortune: How the Ninth Circuit Reviews Erroneously Admitted "Other Acts" Evidence Under Federal Rule of Evidence 404(b)," 23 S.W.U.L.Rev. 661, 667 (1994)

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

With a few variations, this Court adopted the most of the *Federal Rules* into the *West Virginia Rules of Evidence* in 1985.[5]

Because of the potentially decisive impact of uncharged misconduct, and its countervailing prejudicial character, defense attorneys vigorously contest the use of uncharged misconduct evidence. Consequently, Rule 404(b) disputes are *the most frequently*

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[5] Our Rule 404(b) was amended in 1994, and now reads:

> (b) *Other Crimes, Wrongs, or Acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

litigated evidentiary issue in appellate courts.[6] In an unscientific search of West Virginia cases, I found at

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[6] As Professor Imwinkelried states:

> Because of the potentially decisive impact of uncharged misconduct, plaintiffs and prosecutors frequently offer such evidence. Because of the evidence's prejudicial character, defense attorneys vigorously resist the offers. The result is that there is a massive body of case law on uncharged misconduct. The admissibility of uncharged misconduct is the most frequently litigated evidentiary issue on appeal. In the mid-1980's a WESTLAW search of key numbers 369 (Other offenses as evidence of offense charged in general), 370 (Acts showing knowledge), and 371 (Acts showing intent or malice or motive) revealed 11,607 state cases . . . and 1,894 federal cases. Virtually every regional reporter advance sheet contains a new uncharged misconduct opinion, and the federal advance sheets ordinarily contain two or three new decisions on the topic.

Edward Imwinkelried, 1 *Uncharged Misconduct Evidence* § 1:4 [2008] (footnotes omitted). *See also,* Stephanie Yost, "Reversals of Fortune: How the Ninth Circuit Reviews Erroneously Admitted "Other Acts" Evidence Under Federal Rule of Evidence 404(b)," 23 S.W.U.L.Rev. 661 (1994) ("The substantive impact of the Federal Rules of Evidence is especially dramatic in the case of Rule 404(b), which has generated more reported decisions than any other subsection of the Federal Rules."); Kenneth J. Melilli, "The Character Evidence Rule Revisited," 1998 B.Y.U.L.Rev. 1547, 1556 (1998) ("The practical impact of Rule 404(b) must be understood not only in the proportion of cases in which these issues are resolved, but also in the quantity of such cases in which these issues materialize. Rule 404(b) accounts for a greater number of published judicial opinions than any other provision in the Federal Rules of Evidence, and the introduction of evidence of uncharged criminal conduct under Rule 404(b) has

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least 78 published criminal cases in the last 20 years where the admission of other bad acts under *W.Va.R.E.* Rule 404(b) was disputed on appeal.[7]

In many cases, I believe that Rule 404(b) is being applied inconsistently. It appears that prosecutors and trial courts often search for a convenient "pigeonhole" to admit proof of other bad acts, then perform a perfunctory balance of the probative value against its prejudicial effect before admitting the other bad acts evidence.[8] *See* Syllabus Point 1, *State v. McGinnis,* 193 W.Va. 147, 455 S.E.2d 516 (1994). Because a trial court's review of questions under Rule 404(b) are discretionary, on appeal this Court has rarely found that the trial court abused its discretion in admitting the other bad acts evidence. *See State v. LaRock,* 196 W.Va. 294, 312, 470 S.E.2d 613, 631 (1996). If the

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apparently increased substantially since 1975, when the Federal Rules of Evidence were enacted.").

[7] To put this number in context, the *2007 Statistical Report* issued by the Court indicates we reviewed 25 criminal cases in 2007. This suggest that about 1 in 6 criminal cases on appeal involves other bad acts evidence admitted under Rule 404(b).

[8] "It is time to admit that in the real world of criminal prosecutions, the prosecutor will be able to prove relevant specific instances of the accused's uncharged misconduct by employing the 'magic words' vocabulary of Rule 404(b) to frame some intermediate issue in the case, unless the trial judge believes that the probative value of other uncharged misconduct is substantially outweighed by prejudice to the accused, waste of time, or confusion of the jury." Thomas J. Reed, "Admitting the Accused's Criminal History: The Trouble with Rule 404(b)," 78 Temp.L.Rev. 201, 250-51 (2005).

Court does find the trial court abused its discretion, then this Court will often then hold that the admission of the other bad acts evidence in a criminal case was "harmless error." *LaRock,* 196 W.Va. at 312 n.28, 470 S.E.2d at 631 n. 28. *See also,* Rule 52(a), *W.Va. Rules of Criminal Procedure* [1981] ("Harmless Error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.").

E.
An Equitable Solution

I am in agreement with the following commentator who says that, in the context of criminal prosecutions, there is nothing "harmless" about the admission of other bad acts evidence.

> Despite its name, the harmless error doctrine, at least in the context of Rule 404(b) errors, is not "harmless" to anyone.
>
> First, the harmless error doctrine wastes judicial resources. The purported justification of this doctrine is that it conserves judicial resources by preserving convictions infected by Rule 404(b) errors in cases in which the other, admissible evidence of the defendant's guilt is "overwhelming." This justification is dubious at best. If the remaining evidence indicating the defendant's guilt is otherwise so "overwhelming," then why admit "other acts" evidence in the first place? The alleged "need" for the other acts evidence should be evaluated in light of the

issues and other evidence available to the prosecution. If overwhelming proof is truly available, then there is no need for admission of the erroneous "other acts" evidence. This unnecessary evidence serves to distract and mislead the jury. In fact, inadmissible "other acts" evidence ensures there will be an ultimately futile appeal, which merely wastes the resources of the appellate courts, if not those of the litigants and their advocates.

Moreover, in the case of clearly erroneous admissions of "other acts" evidence, the "overwhelming evidence" argument is circular. It places an inexorable temptation before the prosecution to offer, and the district judge to admit, all evidence, even that of questionable value, to create an "overwhelming" case against the defendant. This, in turn, encourages the admission of additional weak evidence because the more overwhelming the indication (or implication) of guilt, the greater the available protection under the harmless error doctrine.

Second, the harmless error doctrine . . . is intellectually indefensible. The harmless error cases were frequently factually indistinguishable from those cases in which Rule 404(b) errors required reversal. But reversals must be grounded on discernible law, not luck. When Rule 404(b) error is clear, no meaningful distinction between "abusive" and "harmless error" is possible. . . .

> Third, application of the harmless error doctrine to Rule 404(b) errors is unfair to the defendant. The broad discretion and the great deference granted to trial judges in the admission of Rule 404(b) evidence, together with the long list of acceptable purposes under which "other acts" evidence may be admitted, already tilts the Rule 404(b) playing field sharply in the government's favor. The Rule is applied in such an inclusionary manner that propensity is the only purpose for which the evidence may not be admitted. Without a countervailing policy of reversing clear Rule 404(b) errors, the defendant's right not to be convicted for being a "bad" person, rather than for the crime charged, is meaningless. It is not too much to require both that district judges exercise greater care in excluding clearly erroneous "other acts" evidence . . .
>
> Moreover, in the interest of fairness to the accused, what little territory these Rules still protect should be carefully guarded. An individual's personal freedom is at stake in the criminal setting; thus greater, not lesser, adherence by district courts to the Federal Rules should be required.

Stephanie Yost, *supra,* 23 S.W.U.L.Rev. at 684-86.

I realize that I will never convince our Court to revert back to the correct rule set out in *State v. Miller, supra,* in 1915. I therefore propose that Rule 404(b) be amended, either directly or through this Court's jurisprudence, to eliminate the "harmless

error" safety net that prosecutors, trial courts, and this Court have relied upon to uphold convictions based upon the admission of uncharged misconduct. I am not advocating for the abrogation of the harmless error rule, only its elimination from our Rule 404(b) jurisprudence.

When a trial court has abused its discretion and admitted irrelevant or prejudicial bad acts evidence, I would hold that reversal and remand for a proper trial should be automatic, no matter how much evidence is otherwise presented. Removing Rule 404(b) errors from the protection of the harmless error rule would force prosecutors and trial judges to limit the evidence to relevant evidence pertaining to the specific charge in the indictment. It would force prosecutors and trial judges to make more careful, consistent and hopefully more equitable decisions about the admission of uncharged misconduct in criminal trials.

I otherwise respectfully concur with the majority's decision.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston. Kanawha County, on the 2nd day of March 2009, the following order was made and entered:

State of West Virginia, Plaintiff Below, Appellee

v.) No. 33835

Gloria Jean Willett, Defendant Below, Appellant

The Court, having maturely considered the record and the oral argument and the briefs of counsel thereon, is of the opinion for reasons stated in writing and filed with the record that there is no error in the ruling of the Circuit Court of Raleigh County, rendered on the 8th day of January, 2007. It is therefore considered and ordered by the Court that said ruling be, and it hereby is, affirmed: all of which is ordered to be certified to the Circuit Court of Raleigh County.

The syllabus of points adjudicated, prefixed to the written opinion aforesaid prepared Per Curiam, was concurred in by Chief Justice Benjamin and Justices Davis, Workman and McHugh. Justice Ketchum concurs and reserves the right to file a separate opinion. Justice Albright not participating. Senior Status Justice McHugh, sitting by temporary assignment, by administrative orders entered on September 11, 2008 and January 1, 2009, in light of the illness of Justice Albright.

A True Copy

Attest: [Illegible]
Clerk, Supreme Court of Appeals

IN THE CIRCUIT COURT OF
RALEIGH COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA VS: GLORIA WILLETT RICHARD WILLETT Defendants.	CASE NO. 06-F-70 CASE NO. 06-F-71

Transcript of the hearing held in the above-styled criminal matter before the Honorable John A. Hutchison, Judge, on the 31st day of July, 2006, commencing at 1:53 P.M. EDST, as reported by Karen R. Meyers, Official Court Reporter of said Court.

APPEARANCES

TOM TRUMAN, ESQUIRE, Assistant Prosecuting Attorney, Counsel for State

PAUL DETCH, ESQUIRE, 201 North Court Street, Lewisburg, West Virginia, Counsel for Defendants

Defendants, **GLORIA WILLETT and RICHARD WILLETT**, in person

* * *

[50] THEREUPON came,

ALAN SCOTT REED

called as a witness on behalf of the State herein, who, having been first duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TRUMAN:

Q Tell us your complete name, please, sir.

A Alan Scott Reed.

THE COURT: Spell your first name, Mr. Reed.

THE WITNESS: A-l-a-n.

THE COURT: Okay, go ahead.

BY MR. TRUMAN (resuming):

Q Mr. Reed, how old are you, sir?

A Twenty-six.

Q And you're currently in the Southern Regional Jail?

A Yes, sir.

Q Why are you there?

A Probation violation, I guess. I'm not even for sure.

Q What are you on – what are you on probation for?

A Drugs and battery.

THE COURT: Mr. Reed, could you drop your hand? She's taking down everything you're saying, and she needs to see [51] you –

THE WITNESS: Yes, sir.

THE COURT: Okay, thank you.

BY MR. TRUMAN (resuming):

Q You were convicted of a drug felony?

A Uh-huh.

Q Do you know when that conviction was?

A No, sir.

Q Do you know about when it was?

A I can't remember.

Q Do you know what it was for?

A Heroin.

Q The Probation Department has notified you that they're going to try and revoke your probation?

A No. They – I tried to go for – go bond, and they told me I have a felony on me, and where I went to Court before on my – where they gave me probation on it, they said I couldn't bond out because I have –

where I pled no contest and guilty it's basically a felony.

Q Mr. Reed, help me out here a little; I think you're confused. You're right; you're a convicted felon, and you were probated as a sentence –

A Yeah.

Q – from that felony.

[52] A Yeah.

Q The Probation Department, according to the document that they served on you sometime last week, indicates that you did plead no contest to a battery –

A Yeah.

Q – and they're using that as one of the reasons to violate your probation. Is that correct?

A Yes.

Q Mr. Reed, we're here today because the detective has indicated from his investigation that you know something about Mr. and Mrs. Willett. Do you know Mrs. Willett?

A Yes, sir.

Q Can you identify her?

A Yes, sir.

Q Where is she?

A (Indicating Ms. Willett).

Q The lady wearing the white and green sweater?

A Yes, sir.

Q How do you know Mrs. Willett?

A She was – lived behind the street from my parents.

Q And how long have you known Mrs. Willett?

A Year-and-a-half, two years, I guess, two-and-a-half.

Q And, what, did you just move into the Willetts' [53] neighborhood, did they move into your neighborhood or what?

A They have been coming there – they been coming – they lived in Florida and they came in once a month to sell their pills.

Q How do you know that?

A Because I bought pills off of them.

Q What kind of pills did you buy from them?

A Oxys.

Q When you say Oxys, do you know –

A Oxycontin, Percocet, Hydros; you name it, they had it.

Q The pills that you bought from the Willetts, did you trade services or did you trade cash for them?

A Cash.

Q And was it from Mrs. Willett?

A Huh?

Q From Mrs. Willett?

A Yes, sir.

Q Did you also purchase pills from Mr. Willett?

A No, sir.

Q Just Mrs. Willett?

A Yes, sir.

Q In the one or two years that you've known Mrs. Willett, approximately how many times did you purchase [54] pills?

A Close to 50 to 100.

Q Are you talking about pills or times?

A Oh, how many times have I bought off of them?

Q Yes.

A Oh, about 50 to 100 times, probably.

Q Mr. Reed, let me ask you this. If you've only known them for 24 months and they come here once a month, while they were here, how long did they stay?

A About three weeks until the pills were gone, and then they go back to Florida.

Q Did you purchase the pills for your own use, or did you purchase them to sell to somebody else?

A Both.

Q Can you tell this Court on any specific date that you recall when you purchased pills from Mrs. Willett?

A No, not any specific date.

Q But it was on a pretty regular basis, every month?

A Yes, sir.

MR. TRUMAN: Can I have just a moment, please?

THE COURT: Yes.

BY MR. TRUMAN (resuming):

Q Mr. Reed, when you purchased the pills from Mrs. Willett, and you named a number of them, of different [55] types that you purchased, were you addicted at that time?

A Yes, sir.

Q Are you still addicted?

A No, sir.

Q Is it only because you're in jail and you don't have access?

A No. I went – no, I went to BARE to detox myself.

Q When did you do that?

A A few weeks ago. Yeah, I mean, I . . .

Q You're addicted, but you're in remission right now; is that –

A No, I – I've quit, believe me, yeah.

Q Did you also buy drugs from other people or just Mrs. Willett?

A What do you mean?

Q Did you buy from other people, buy pills from other people or just Mrs. Willett?

A Other people, too, yeah.

Q Where did you get the money to spend for the drugs?

A Other people, you know, just other people. They – every time I sold, they gave me something out of it.

Q So – so that I understand what you're saying, sometimes you bought and paid cash to –

A Yeah.

[56] Q – Mrs. Willett and used the pills; is that right?

A Yes.

Q Sometimes you bought –

A Every time I bought pills was to do them. I mean, every time I messed with them was to get pills so I could do them.

Q So your testimony, as I understand it is, you were – you were buying pills from Mrs. Willett to support your habit?

A Yeah.

Q You would either turn around and sell them so you could get more cash to buy more pills, or you'd use them yourself –

A Yeah.

Q – is that right?

A Yeah.

Q How did you find out Mrs. Willett had pills to sell?

A Her brother introduced me to her.

Q What's her brother's name?

A Gary Lilly.

MR. TRUMAN: That's all the questions we have for Mr. Reed today, Your Honor. Thank you.

THE COURT: Mr. Detch?

[57] **CROSS-EXAMINATION**

BY MR. DETCH:

Q Mr. Alan [sic], as I understand it, you first learned of Mrs. Willett because they lived in some proximity to where your parents live; is that correct?

A Yes, sir.

Q And how long ago was that, that they moved there, that you then knew Mrs. Willett?

A They – they've been there. I just now – I just met them. They just came in once a month to sell the pills and then they'd go back to Florida.

Q And when did that start?

A When did I meet them?

Q Yes.

A I'm not for sure of the specific date, but Gary introduced me to them, but they were there before I met them.

Q When did you then meet them?

A Huh?

THE COURT: He doesn't understand your question.

BY MR. DETCH (resuming):

Q When did you meet them?

A Make them?

THE COURT: Meet.

[58] BY MR. DETCH (resuming):

Q Meet, when did you meet them?

A I'm not for sure of the specific date; I'm not for sure.

Q Well, you had said –

A Two years ago probably, about a year-and-a-half, two years ago, year-and-a-half.

Q And that would have been a year-and-a-half ago, a year – a year-and-a-half to two years ago?

A Yes.

Q And, as I understand it, you met them through Gary; is that correct?

A Yes, sir.

Q And what were the circumstances of that meeting?

A To buy pills.

Q And I take it that Gary would be a person who would be available to confirm or deny that particular statement?

A Yeah.

Q Now – and where did that particular transaction take place?

A I went down to Gary's, and Gary said he didn't have any, so we went to his sister's house.

Q And both of you went?

A Yes.

[59] Q And that would have been, to your best recollection, two years ago?

A Yes.

Q Can you tell us anything about the time of the day?

A It was night.

Q Can you tell us the time of the month?

A No.

Q Can you tell us the season?

A No.

Q Now, when did you next go to see Mrs. Willett?

A I think the next day.

Q The next day?

A Yeah.

Q In daytime, nighttime?

A Daytime.

Q So this was daytime?

A Yeah, the next day when I went back.

Q And then when was the next time that you saw them?

A I can't remember. I mean, I just – they had a bunch of them, and I was addicted, and it was like a big old candy factory to me. I just – I went back as soon as possible.

Q Now, the next day, did you go back with anyone?

A No, no, huh-uh.

[60] Q And so the first time, we can corroborate that through –

A Gary.

Q – Gary Lilly, but the next time, we could not?

A Yeah.

Q Now, you've indicated that you've made, if I understood, 50 to 100 buys; is that what I understand?

A Yes, sir.

Q And that would have taken place, I take it, at least 50 different times?

A Yeah.

Q And how many times per month did you come and purchase these from Mrs. Willett?

A Until they ran out.

Q Well, it was at least two years, let's say, and once a month, that's twenty-four months, that would be two times per month if I'm getting to fifty?

A It was more than that. I bought a lot off of them. I sold a lot for them, 100 Oxy 40s at a time.

Q Now, on any of these purchases, was anybody present besides yourself?

A Huh-uh, Gloria.

Q Just Gloria?

A Yes, and the guy that was buying them.

[61] Q Well, I thought you were buying them?

A No. I introduced her to somebody else that was interested in them, a guy named Larry Webb.

Q Larry Webb?

A Yes.

Q And so he bought. Do you know how many times he bought?

A I was there twice when he bought 100 at a time.

Q And so, if I understand it correctly then, he was with you and only made two purchases?

A Until he cut me out of it; then they went back and dealt with them.

Q I'm sorry, I don't understand?

A They went back to them and sold them to him without me; I know that for a fact.

Q But the ones that you claim that you were personally present when two were sold to this Larry Webb?

A Yes.

Q Can you give us a timeframe on that?

A The first time was at night, and the second time was during the day. I'm not for sure what day of the month or what day of the week or anything, but I know it was nighttime the first time, and the second time was during the day, 'cause Gary bought a motorcycle off of him.

[62] Q Gary bought a motorcycle?

A Uh-huh.

Q Gary –

A Gary was there, too.

Q Gary Lilly?

A Yes.

Q And he bought a motorcycle?

A Uh-huh.

Q Is there anything else that you can provide to us that helps us, a time or a season or –

A No.

Q – anything?

A No.

Q And these would be the only witnesses who could corroborate your story?

A Yes.

Q Is there any physical evidence that you know of or that you showed anybody that would help corroborate your story or help us understand exactly when these times took place?

A My ex-girlfriend.

Q And who was that?

A Jacinda Graham.

THE COURT: Say the name again.

[63] THE WITNESS: Jacinda Graham.

THE COURT: Spell the name.

THE WITNESS: J-a-c-i-n-d-a Graham, G-r-a-h-a-m.

BY MR. DETCH (resuming):

Q And I take it, this Ms. Graham, you would have been showing her the pills after you purchased them?

A Yes.

Q Do you now where's she's at?

A No.

Q When was your last purchase of pills from the Willetts?

A I'm not for sure.

Q Can you give us a proximity in time?

A No, sir.

Q Did all of these take place at the Willett residence?

A No. Them two – it did every time except for those two times that we went over to Larry Webb's house and they sold – they got $3,000 out of them each time.

Q I take it that there were two transactions that took place at Larry Webb's; is that –

A Yes.

Q And those were for $3,000 apiece?

A Yes.

[64] Q And can you tell us anything about when those would have taken place?

A Those – it was night – it was at night and one of them was during the day when he bought the little dirt bike off of him.

Q Are you sure that the $3,000 wasn't part of the dirt bike transaction?

A No. He – no, 'cause he got a good deal on it, I remember. I'm not for sure how much he paid, but he – he was bragging about how much he got – got it for.

Q Were you – were you present for that buy?

A Yeah.

Q Do you know of any way that we could, by reasonable investigation, find any way of corroborating what you have to say? Do you know what I mean by corroboration –

A Yeah.

Q – saying that you're telling the truth?

A My ex-girlfriend. My ex-girlfriend, she would.

Q When these transactions took place, how were these pills delivered to you?

A How were they delivered to me? I'd walk in their house. They went and – they brought – I'd tell them – I'd write down what I wanted, and they'd go back and get it and count the money and bring it back to me.

[65] Q You would write down what you wanted?

A Uh-huh.

Q I take it, you had a sum of money?

A Yes.

Q And how much money would you have had?

A That depends on how much I wanted.

Q And how – how much would you have wanted, and where would you have gotten the money?

A Just different people. They'd give me a good deal on it, and I'd go out and sell for them and make me some pills out of it.

Q Now, when they came back with the pills, okay, was it in any type of container that we could examine or see –

A No.

Q – or inspect?

A I remember one time they would front me oxy 20s, and they have them in dime bags separated.

Q Do you have any of those bags or –

A No.

Q – anything that we can look at?

A I don't have any of those.

Q Did they handle anything when they were doing this that we might check for fingerprints or anything?

A No, no. They had them in a big bag; that's all I [66] know.

Q And could you describe the big bag?

A It was a big sandwich bag that they had the little baggies in.

Q Like a big sandwich bag?

A Yeah, big zipper –

Q Like a grocery bag, like a –

A A Ziploc bag.

Q Like a Ziploc bag that would have –

A Yeah, just they'd have them separated.

Q And when you bought them, I take it then, they would have had to have had a quantity of Ziploc bags?

A I just seen the Oxy 20 bag, I mean, it had a bunch of little baggies in it that had Oxy 20s in them and they had – and it was inside of a big Ziploc bag.

Q Now then, on the other occasions that you purchased, did they likewise have the same type of Ziploc bags?

A No. she'd go in the back bedroom and get them and give them to me.

Q Just gave it to you without a bag or anything else?

A Well, if I needed a baggie, they'd give me a baggie.

Q Would you have obtained any evidence or anything [67] that anybody could check for fingerprints

to try to trace the history of it to determine whether there was any connection to the Willetts?

A No, sir.

Q When did you first tell the authorities about any of these transactions?

A I was trying to cut a deal to get out of jail.

Q And when was that?

A I called them from jail and they got them. I just read in the paper.

Q I'm sorry, I missed that. You ran the paper?

A I read the paper and I saw that they busted them.

Q And I take it that that's when you stepped forward and said, Well, I can help you on that case"?

A Well, I'm the one – I called them and told them about it at the very beginning and to get a deal to stay out of jail.

Q I'm not sure I understand that. Did you say that you initially called and – called the, I assume the police; is that what you're talking about?

A Yes, I called the police.

Q And when did you first notify the police?

A I'm not for sure a specific date, but I did call them from jail, so I think you can look it up on records or [68] something. I'm sure you could find out.

Q Was that before or after the Willetts appeared in the paper?

A That was before.

Q And how long before?

A I'm not for sure.

Q After you called someone, do you know who you called?

A I talked to Dean Bailey.

Q Dean Bailey?

A Yes.

Q And did you give him a statement?

A I just told him I knew where some stuff was – I told him I knew where some pills were and I needed to get out of jail and I stayed in, you know.

THE COURT: I didn't hear what you said.

THE WITNESS: Nothing. I said I told Dean Bailey where I bought them at, everything.

BY MR. DETCH (resuming):

Q I take it Mr. Bailey then would have some type of memorandum or something we can refer to of this particular statement?

A I don't know. I just talked to him over the phone. They may have recorded it; I don't know.

Q That was – that was the phone call from the jail?

A Yeah.

Q When did you next talk to authorities about any of this?

A I'm not quite for sure, to tell you the truth.

Q Well –

A I mean, they subpoenaed me about two weeks ago, I guess, on this.

Q Well, other than this statement that you made by telephone from the jail, did you not talk to the police officers and give any type of detailed statement or anything at all?

A Well, not really. I – I'm not – I don't – no, not that I know of.

Q When was the next time you have any recollection of talking to the police about his matter at all?

A About two weeks ago, two-and-a-half weeks ago.

Q So you didn't talk to anybody about this till two weeks ago, other than this one phone call from the jail?

A Yeah, basically.

Q Did Officer Montgomery or anybody ever come and just sit down beside you and talk?

A He did come one day and ask me if I would testify, and I told him I would, and that was probably about a year [70] ago; I remember that. He came to my parents' house.

Q He came to your parents' house?

A Yes.

Q And did you give him a full and complete statement at that time, to the best of your knowledge?

A He asked me if I'd help testify and I said yeah, I would.

Q Did you not tell him what it would be that you would testify about?

A He told – he asked me if I'd testify against Gloria and them, and I said I would.

Q Now, from the time that you spoke to Mr. Montgomery on that occasion, had you made – did you make any buys from Mr. or Mrs. Willett after that time?

A No, because they – no.

Q And so I take it that everything took place prior to that particular meeting with Mr. Montgomery?

A Yes.

Q And if that was a year ago, then I take it then, if you've only known the Willetts for two years, that all of these transactions took place of a one-year period of time?

A It was about two – about two – no, it was about two years I was buying off of them.

[71] Q Was there any particular time of the month that the Willetts would come or –

A They wouldn't tell you. They just – they'd just show up and Gary would call.

Q At the beginning of the month, the end of the month?

A At different times.

Q Just random times?

A Yes.

Q How did you know that they were coming?

A I'd keep in contact with her brother.

Q All right. Was there then some other way that you would have known the Willetts? You indicated you knew them through your parents. Did you ever have any business transactions with the Willetts, other than these drug transactions?

A No, sir.

Q Not at all?

A Well, I cut their grass a couple times. That's about it.

Q How many times do you think you cut the grass?

A Probably twice, and that was for pills.

Q Just out of curiosity, how many pills cuts grass?

A I think they give me an Oxy 40.

[72] Q An Oxy 40?

A Uh-huh.

Q For each time?

A Yes.

Q And that was, again, Mrs. Willett?

A Yes.

Q Did you have any transactions at all with Mr. Willett?

A No, sir.

MR. DETCH: I have no further questions.

THE COURT: Mr. Truman?

REDIRECT EXAMINATION

BY MR. TRUMAN:

Q Mr. Reed, was Mr. Willett present when you purchased from Gloria?

A He was there. I just – he was there. He came in twice; I met him twice.

Q Did he watch you exchange money for pills –

A Yeah.

Q – and he was there?

A Yeah. He – he was there twice, two different months.

Q And that's what I'm asking you. Did Mr. Willett see you and his wife exchange money –

[73] A Yes.

Q – for pills?

A Yes.

MR. TRUMAN: Can I have just a moment, please?

THE COURT: Yes.

MR. TRUMAN: The State has no further questions of this witness. Thank you.

THE COURT: Recross?

RECROSS-EXAMINATION

BY MR. DETCH:

Q On these two occasions that Mr. Willett watched, were those the same two times that you cut the grass, or were they different times?

A Different times.

Q And you can't tell us what days or months that occurred?

A No, sir.

MR. DETCH: I have no further questions.

MR. TRUMAN: Nothing from the State, thank you.

THE COURT: May this witness be excused?

MR. TRUMAN: He's free to leave the Courtroom, yes.

THE COURT: Well, that's what I mean. He's free to step down and I don't need him anymore today –

MR. TRUMAN: Right.

[74] THE COURT: – and I can him back in the custody of the Sheriff?

MR. TRUMAN: Yes, sir.

Sheriff, if you want to go ahead, I don't know, has the bus come yet?

THE SHERIFF: I'm not sure, Your Honor. I would assume so but I'll check.

THE COURT: Give a holler across and see if the bus has run and, if it hasn't, take him over there. If it has, you can hold him here until you're ready.

You may step down, Mr. Reed.

(Witness Stands Aside)

All right. Mr. Truman?

MR. TRUMAN: Your Honor, Mr. Lilly is not under subpoena. So far as we know, he is in Florida. He was going to be the other witness and he never got another supplemental statement to the defense, so that's all the State has to offer.

THE COURT: All right. What's your position?

MR. TRUMAN: Your Honor, it's a matter –

MR. DETCH: My client would like to offer some evidence.

TRUMAN: Oh. I'm sorry.

THE COURT: I'm sorry, go ahead. Call your next [75] witness.

MR. DETCH: Call Mrs. Willett. I assuming the State has rested on that issue?

MR. TRUMAN: Yes.

(Witness Sworn)

THE COURT: Have a seat right over here, ma'am (indicating).

THEREUPON came,

GLORIA WILLETT

called as a witness in her own behalf herein, who, having been first duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DETCH:

Q State your name, please?

A Gloria Willett.

Q And what is your mailing address?

A [Home Address Omitted]

Q On occasion, do you and your husband come to the state of West Virginia and have property here in Beckley, West Virginia?

A Yes, we do.

Q Do you know Mr. Alan [sic] who is still seated here in the Courtroom?

[76] A Yes, I do.

Q How do you know Mr. Alan [sic]?

A My brother brought him to me to get him to mow my grass.

Q And on – has he then mowed your grass?

A He mowed my grass a few times, yes.

Q And what did you pay him?

A Thirty dollars a time when he mowed it.

Q Have you ever sold him any pills?

A No, I have not.

Q Has there been any times that you've sold him any types of pills, Oxycontins or any illegal drugs of any type or form?

A No.

Q Has your husband ever been present when any drugs were sold, to your knowledge?

A No.

MR. DETCH: I have no further questions.

THE COURT: Mr. Truman?

CROSS-EXAMINATION

BY MR. TRUMAN:

Q Do you recall when you met Mr. Reed for the first time, ma'am?

A I think it was July or August of '04.

[77] Q And that was an introduction from Greg Lilly, your brother?

A Gary Lilly –

Q Gary, I'm sorry –

A – my brother, yes.

Q – Gary Lilly? Where is Mr. Lilly?

A You know, I have no idea.

Q When was the last contact you had with him?

A He called about a month ago and said – I'm repeating what he said, that you had sent a summons to him to come to Court on a grand jury thing. That's the last I heard from him.

Q So you haven't seen him since he's supposedly gone back to Florida?

A No.

Q Haven't talked to him?

A No.

Q You've read a copy of Mr. Lilly's statement; haven't you?

A Yes, I have.

Q Would you take issue with what your brother accuses you of, I take it?

A Sure.

Q Do you have a reason as to why your brother would [78] say those things?

A At one point in time, before this all took place, my brother broke into our house and took our medication. I did not call the police, but he did turn himself in to some hospital.

Q You're talking about "he," your brother?

A Yes, my brother.

Q For rehab, that kind of hospital?

A Over –

Q You may not know, I just –

A I really don't know. I just know that he went to the hospital. I went and told his wife. His wife found out where he – where he was at and we went to where he was at, and they had put a – I guess they had pumped his stomach or something, yes.

Q Was that locally in West Virginia or –

A Yes, in Beckley.

Q Oh, was it in Beckley?

A Uh-huh.

Q Do you remember which hospital it was? Was it near the interstate or was it on the other side of town?

A Appalachian, is it?

Q All right.

A Appalachian.

[79] Q So your brother is a – is or was an addict?

A I do believe so.

Q You'd seen him impaired from the use of pills?

A Yes, I have.

Q But you really don't have a reason as to why he would pick you to give a statement to the police?

A Well, I - I think that he thought I had called the police to tell the police that he had broken into my house, but I didn't.

Q That's your best guess?

A Yes, that's my best guess.

Q What led you to believe that your brother broke into your house? Did he tell you that?

A Yes.

Q I see. Do you know when that break-in took place?

A I – don't hold me to it, but I think it was like Decem – no, November of '04.

Q And the incident at the hospital, when would that have been?

A November '04, I'm pretty sure.

Q Did your brother get charged with the break-in at your house?

A No, because I did – I didn't call the police. He just thought that I was going – I had called the police, [80] and I didn't, but he had broke into my window in front of my bed, and then he pulled my bed back and put the glass all back in the window. And he did admit to breaking into the house, yes.

Q When did he make that admission?

A When I went to the hospital that night.

Q Tell – maybe the timeframe is confusing me a little bit. The break-in at your house was November – winter/late fall of '04?

A I think it was, yes, sir.

Q And you and your brother talked about this when?

A When I had went to his wife and told his wife that somebody had broken in my house, and I thought it was Gary.

Q And when would that have been?

A In November.

Q Right around – right around the time of the break-in?

A Yeah, the same time.

Q And the incident at the hospital was when?

A In November.

Q All of this happened within a few days?

A All of this happened in November, yes, in a few days' period.

Q And he was never arrested for that break-in?

[81] A No.

Q I guess I'm wondering if nothing happened to your brother at that – as a result of the break-in and that was in November of '04, why did he give a police statement in May of '05?

A Because I had quit talking to him because of this incident of him breaking into my house, and I had told him I was going to call the police.

MR. TRUMAN: Thank you. That's all the questions the State has.

THE COURT: Mr. Detch?

MR. DETCH: No further questions.

THE COURT: You may step down, ma'am.

(Witness Stands Aside)

MR. DETCH: Call Mr. Willett.

THE COURT: Mr. Willett.

(Witness Sworn)

THEREUPON came,

RICHARD WILLETT

called as a witness in. his own behalf herein, who, having been first duly sworn according to law, was examined and testified as follows:

[82] **DIRECT EXAMINATION**

BY MR. DETCH:

Q State your name, please.

A Richard Willett.

Q Would you give us your address, also?

A [Home Address Omitted]

Q I gather you are married to Mrs. Willett?

A Yes.

Q That's your wife?

A Yes, sir.

Q Now, it's my understanding –

THE COURT: Sir, you need to speak up, please. Go ahead.

BY MR. DETCH (resuming):

Q You've been present when Mr. Alan [sic] testified here previously?

A Yes, sir.

Q And you heard him testify that you were present when there was allegedly two drug transactions which you were present when your – allegedly Gloria Willett sold him some pills? You heard his testimony; didn't you?

A I heard that, yes.

Q What is your position in regards to the truthfulness of that particular statement?

[83] A That's not the truth.

Q Were you ever present when any drug transactions took place between your wife and Mr. Alan [sic]?

A No, sir.

Q Was there any type of business relationship, to your knowledge, between your wife or anybody in your family – that is your immediate family, I don't want to know about your brother-in-law but at least your wife – involving Mr. Alan [sic]?

A The only thing that she had involved with him was to mow the grass.

Q Other than mowing the grass, was there any type of business deal between them?

A Not that – no.

MR. DETCH: I have no further questions, pass the witness.

THE COURT: Mr. Truman?

CROSS-EXAMINATION

BY MR. TRUMAN:

Q Do you pronounce your last name Willett or Willett?

A Willett.

Q I've been saying it wrong since I read it, and I apologize for that. Mr. Willett, although you are here telling the Court that you were not present for the two [84] times Mr. Reed said he purchased pills or exchanged pills for money or services, depending on your point of view, you weren't there those two times. You'd agree with me that it could have taken place at other times when you weren't there; isn't that true?

A No.

Q Not true, couldn't have happened? Even if you weren't there to witness any of it, it just couldn't have happened?

A No.

Q It's an impossibility?

A No.

Q It's not an impossibility, or it is an impossibility?

A No, there's no possibility of it.

Q I'm sorry.

A No possibility at all.

Q Even though you weren't there and you don't know what happened, you just consider it impossible?

A Well, actually impossible.

Q Mr. Willett, you were present when the officers raided your house or executed a search warrant?

A Yeah, I was there.

Q And during the search, they found a lot of pills, [85] and they also found a gun with pills under a mattress. The pills, gun under your mattress; do you remember that?

A I don't recall that.

Q You own a gun; didn't you?

A Yeah, I own a gun, yeah.

Q Kind of an odd .22, kind of big for a .22 –

A Yeah.

Q – but it's a .22?

A Yeah.

Q And you had that with the pills; right?

A I don't remember.

Q Why did you have a gun? Why did you have the gun?

A Because my house got broken into and I didn't know, that neighborhood is kind of rowdy

sometimes around there, you know. I mean, you've got a right to protect your property.

Q So you had the – you had the gun for protection?

A Right.

MR. TRUMAN: Mr. Willett, that's all the questions the State has. Thank you.

THE COURT: Mr. Detch?

MR. DETCH: No further questions, Your Honor.

THE COURT: All right.

MR. DETCH: We rest, Your Honor.

[86] THE COURT: You may step down.

(Witness Stands Aside)

Your position, Mr. Truman?

MR. TRUMAN: Well, again, the State doesn't have to meet a very high test. It's a preponderance of the evidence. The Court has conflicting – heard conflicting testimony.

Mr. Willett doesn't really add much to this since he wasn't even present on the vast majority of occasions, and the Court has to find by a preponderance of the evidence that the crime occurred and that the defendant was the one who committed it.

I think at this point that the State has met that burden and the evidence should be adduced for the limited purposes as notified by the State, planning, motive and intent.

In a possession with intent case, 404(b) evidence, even though it's fallen in disfavor and despite the premise that it's a rule of inclusion, how else can you prove intent of somebody without – there's no way to open up their brain housing and see what they were thinking at the time. You have to do it on the basis of actions.

And certainly the testimony of Mr. Reed provides that – that motivation or intent that is a necessary element of [87] the State's case, and there's really no other type of evidence the State can produce at this point to prove that element.

THE COURT: Mr. Detch?

MR. DETCH: Your Honor, this is, of course, a 404(b) hearing. The purpose of 404(b) evidence is to show other crimes or other wrongs. And in order for the State to be able to do that, they have to be able to establish those other crimes or wrongs by a preponderance of the evidence, and that means by a greater weight of the evidence.

In this particular matter, we had filed specific motions asking for a bill of particulars that would allow us to know when these other crimes allegedly took place. That way, we would know whether Mr. or Mrs. Willett were in town. We could perhaps establish

some type of alibi or do something in terms of corroborating that they could then establish that they were not present, not in the state of West Virginia when these other wrongs took place.

This gentleman, Mr. Alan [sic], desires to taint my clients by saying that there were some 50 to 100 transactions, and yes we have heard nothing that corroborates anything that he said. The one witness that he has said that would corroborate it is Mr. Willett, but he says the transaction took place in his presence on two [88] occasions, and that now has been specifically denied.

The State has the burden of going forward. My clients, Gloria Willett and Richard Willett, both have the presumption of innocence that, even in these proceedings, is a presumption of innocence.

We would establish at the very best that they have offered testimony, but the Court, in order to allow that to go to a jury, has to decide that it is credible and that it has been proven by at least a preponderance of the evidence.

It is specifically barred for the purpose of trying to show the propensity of committing the crime, and I would submit, Your Honor, that all they are offering this for is to taint my client, saying they have the propensity to sell these drugs because it supposedly took place on 50 or 100 times.

But then again, when you ask them for specifics as to when it took place, if there's anybody that they

can produce to corroborate it, if they can offer any physical evidence that would corroborate it, then we find that Mr. Alan's [sic] testimony suddenly totally and completely fails.

And what we have here is, is we have two witnesses who say these drug transactions did not take place. And you, Your Honor, can look and determine that yes, they had credibility, and they not only have credibility, they have [89] the presumption of innocence behind them.

And what we have here is Mr. Alan [sic], who is trying by his own admission, contacting the police and saying "Oh, I want to make a deal, I want to get out of jail, and yet we can't find any time that he made a statement or did anything else that did anything for any other purpose than his own self-service.

And I would submit, Your Honor, that if you follow the rules on this particular matter, that the State here has woefully failed to prove their case, these other crimes or wrongdoings by any preponderance of the evidence.

And for that reason, Your Honor, we believe that Mr. Alan's [sic] testimony here should be barred, simply because it's here for the sole purpose of trying to show a propensity to be able to sell it, and that that is specifically what's been barred under 404(b), and we would submit it should be barred and our motion to suppress should be granted.

THE COURT: Mr. Truman?

MR. TRUMAN: Just a couple – couple comments here, one of which is that Mr. Reed's attempt to get a deal failed. He's already said he got convicted, and he's on probation, and it doesn't look like he's going to last much longer on that.

[90] So the fact that he – he reached out to the officers to try to make that deal is really of no moment because it didn't work out for him, and it's just – the Court will have to determine whether or not the State's put on a preponderance of the evidence and who has a reason to be more credible and who doesn't.

THE COURT: I'll reserve ruling. I want to look at a couple things before I issue a ruling.

Is there anything else today?

MR. TRUMAN: I believe that concludes the State's business today, Your Honor.

THE COURT: Mr. Detch?

MR. DETCH: The only other thing that I have, Your Honor, is, according to my secretary, there was something scheduled for next Monday involving Mr. Willett that I think was just a kind of a pre-trial or something, and if you could save us from having to travel over here just to check in, I would appreciate it if we could take it up on Tuesday if it's important, or at least that's what my secretary told me as I was going out the door.

THE COURT: Well, let me see, Monday, Monday the 7th?

MR. DETCH: Yes.

THE COURT: I don't see anything on my schedule for Mr. Willett.

[91] MR. TRUMAN: The State's unaware of anything involving Mr. Willett.

MR. DETCH: In any event, he'll be here on the 8th, Your Honor. I just wanted to make sure if he didn't appear on the 7th that he was not in any violation of anything. Sometimes, my secretary is over-zealous.

THE COURT: Well, I am not aware of anything, and based upon my review of the docket for and my schedule for Monday, August the 7th, I don't see Mr. or Mrs. Willett scheduled for anything.

MR. DETCH: Thank you, Your Honor.

THE COURT: We'll see you Tuesday.

MR. DETCH: Does Court start at 9:00?

THE COURT: 9:00, and I'll issue a ruling. I'll try to have a ruling out by tomorrow evening with regard to this issue, and it may be in the form of a letter. I may ask somebody else to prepare an order. All right.

I need your jury instructions and proposed verdict form by Friday. Your jury instructions should be

case specific. I have a general criminal charge that I give, so make your instructions case specific with regard to the issues that you believe need to be dealt with. I need those – I need them in a hard copy, and I need a disk either in WordPerfect or Word format.

[92] MR. DETCH: Does your clerk have a copy of your general charge that you have so that I can review and study it?

THE COURT: We can probably get you a copy. If not, if I can't lay my hands on it this evening, then I'll get it mailed out to you tomorrow.

MR. DETCH: Thank you, Your Honor. May we otherwise be excused?

THE COURT: Otherwise, anything else, Mr. Truman?

MR. TRUMAN: Let me go ahead and just to make absolutely sure. I will give Mr. Detch my copy of the CD (Hands to Mr. Detch).

THE COURT: The record will reflect that the prosecutor has provided, as Mr. Truman would indicate, a second copy of the taped statement.

MR. DETCH: And, Your Honor, I'm looking in my file, and I'm not challenging that he did not –

THE COURT: I'm just saying, that's his position. With that, we're off the record. I refer Mr.

Reed back to the custody of the Sheriff for transport back to Southern Regional Jail.

(WHEREUPON, the record was closed in said matter.)